

# **Exhibit 315**

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

IN RE: \*  
\* 2:13-cv-20000-RDP  
BLUE CROSS BLUE SHIELD ANTITRUST \*  
\* October 5, 2017  
LITIGATION MDL 2406 \* 9:00 a.m.  
\*  
\* Birmingham, Alabama  
\*

\* \* \* \* \*

**TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE R. DAVID PROCTOR  
UNITED STATES DISTRICT JUDGE**

\* \* \* \* \*:

1 Blue-on-Blue competition, hospitals were able to have higher  
2 profit margins because of the Blue-on-Blue competition, and  
3 that's testimony from Capital Blue Cross where they're taking  
4 that example and addressing what happens when there's  
5 Blue-on-Blue competition.

6 Your Honor, the final point really is to make it  
7 clear -- that I want to make on behalf of all plaintiffs is to  
8 make it clear that we are not waiving the quick look argument.  
9 We think all our claims, the provider claims and the  
10 subscriber claims, are covered under the per se rule. That's  
11 our position. That's what we want to address. But we are not  
12 waiving the alternative quick look argument, and other than  
13 what's in our papers, we are prepared to address at whatever  
14 point the questions the Court may have about that.

15 Thank you very much. And now Michael will address  
16 the nonBlue competitive restrictions on behalf of subscribers  
17 and providers.

18 MR. HAUSFELD: Good morning, Your Honor.

19 THE COURT: Good morning.

20 MR. HAUSFELD: We start with a literally fundamental  
21 principle and that is the law with regard to agreements  
22 between actual or potential horizontal competitors and what's  
23 called output restrictions.

24 As the Supreme Court has made clear and there has  
25 been no retraction or diminishment of the force limits of this

1 proposition, looking at slide 1, horizontal agreements to  
2 limit output are viewed as tantamount to an agreement to fix  
3 price and are subject to a per se rule. That applies with  
4 full force, Your Honor, to this case, because on their face,  
5 fundamental economics, business awareness, and judicial  
6 history has confirmed the inescapable, predictable,  
7 anticompetitive consequences of output restrictions. That's  
8 why, without further inquiry, on their face these types of  
9 restrictions are considered violative or found to be violative  
10 of Section 1 of the Sherman Act.

11 One of the things that needs to be understood here,  
12 Your Honor, if we look at slide 4, is exactly what are the  
13 relationships here with regard to the best efforts which fix  
14 the rules of engagement between the Blue brands and the  
15 unbrandeds, or as this chart reflects them or characterizes  
16 them, the green brands.

17 ESAs prevent Blue-on-Blue competition within the  
18 ESAs, but the best efforts rules prevent green competition  
19 with Blues within the ESAs and Blue and green competition  
20 outside of the ESAs as well as restricting competition between  
21 greens outside of the ESAs. This is an entanglement, Your  
22 Honor, which goes beyond any governance claims. It goes  
23 beyond any brand claims. It goes beyond any single enterprise  
24 claims.

25 The best efforts rules are the rules of engagement

1 for inter-brand competition and they are designed on their  
2 face to restrain and restrict that competition.

3 A bit of history here is in order. Not to look back  
4 upon what happened, but whether the Blues understood at the  
5 times of crafting and implementing these regulations they knew  
6 on their face that they were restricting inter-brand  
7 competition.

8 If we look at slide 5, from 1987 through 1994 there  
9 was no restriction on unbranded competition both within and  
10 outside ESAs. In 1991 they began to think of whether or not  
11 they should because the unbrandeds were beginning to grow and  
12 make inroads on the health insurance business of the Blues.  
13 In 1992 they resolved not to regulate unbranded activity, but  
14 in 1994 they reversed that. In 2005 they extended that  
15 reversal to include a prohibition or a regulation of national  
16 best efforts restricting unbranded competition with the Blue  
17 brands outside of ESAs.

18 If we go to slide 8, Your Honor, and we offer this,  
19 again, not to discuss the history of what was done but the  
20 fact of what was known by the Blues in terms of what would  
21 happen from a practical business and economic perspective of  
22 regulating unbranded competition. They considered some of  
23 them, of the unbrandeds, as traitors and they knew that there  
24 were those who were unwilling to participate in the regulation  
25 of competition. This was before the best efforts rules were

1 imposed on the local level. They knew they were regulating  
2 competition in the market illegally.

3 And if we look at slide 9, Your Honor, what kind of  
4 competition is it that they knew that they were restraining?  
5 To the extent that these stronger, more diverse plans compete  
6 on an unbranded basis, the Blue document says before the  
7 enactment of the local best efforts with Blue Cross and Blue  
8 Shield plans, such additional competition -- and this is the  
9 key -- like the competition which the plans are already facing  
10 from other commercial companies. So the unbrandeds of the  
11 Blues were no different than any other inter-brand competition  
12 that the Blues were facing and they knew it, and yet they also  
13 knew that there were public benefits if that competition on an  
14 inter-brand basis were not regulated because the public  
15 benefits from more and better choices, whether they come from  
16 commercial insurance companies, HMOs, or unbranded  
17 subsidiaries of the Blue Cross Plan, conflict with the  
18 underlying principle of the American free enterprise system  
19 that consumers benefit from competition that results in  
20 improved products, services, and prices.

21 And if we take a look at slide 10, Your Honor, they  
22 knew that the effort to justify this local restraint on  
23 unbrandeds was nothing more than a guise, and they knew that  
24 the real efforts, as stated in Exhibit 253, that the local  
25 best efforts was an important step in protecting the plans

1 from becoming competitors in the same geographic area.

2 Now, let's follow through with that concept. If we  
3 take a look, Your Honor, at slide 12, what happened was these  
4 unbrandeds grew in strength. They became bigger competitors.  
5 They became good providers to both doctors and subscribers of  
6 competitive offers in the health insurance industry.

7 Today with consolidation, acquisition, mergers, and  
8 the expansion of unbranded competition, the competitive  
9 landscape is shifting. We have pure Blue affiliations and we  
10 have acquisitions of nonBlue companies by Blue plans. The  
11 historically stable alignment of interests among Blue plans  
12 can no longer be taken for granted. This is looking forward,  
13 Your Honor, not backwards. This is looking at what it is they  
14 knew on its face would be the consequences of not regulating  
15 unbranded competition from other Blues. It is quite likely  
16 that with no new constraints assuring that our mutual interest  
17 remain paramount, we will see a Blue plan faced with a choice  
18 where enlightened self-interest will dictate a nonBlue  
19 decision. Code words, if we don't take action to regulate and  
20 restrict and restrain this competition, we as Blues are going  
21 to lose inter-brand competition to the unbrandeds.

22 And let's take a look, Your Honor, at slide 13.  
23 Here is what they knew as opposed to here is what is being  
24 expressed in this court with regard to what rights they had or  
25 didn't have. The purpose of trademark enforcement is to avoid

1 public confusion, not to authorize restraints on trade. And  
2 this is what a Blue plan wrote to its other Blue plans under  
3 established law, and this was before, Your Honor, those  
4 restraints were put into effect. Under established law,  
5 restrictions on unbranded competing models could only be  
6 justified by actual proof of confusion, which did not exist at  
7 the time they enacted the local best efforts, and the document  
8 goes on to say 6 years later, they still can point to no such  
9 evidence of actual confusion.

10 So at the time they enacted the national best  
11 efforts, there was likewise no evidence of actual confusion.  
12 And there was no confusion, Your Honor, by the Blues as to  
13 what they were doing.

14 If we look at slide 15, this is an internal memo  
15 from Anthem objecting to the enactment or imposition of  
16 national best efforts on the Blues as nonBlues.

17 Plans opposing the national best efforts could argue  
18 that the purported rationale for such a growth restriction  
19 strengthening the brands is really pretext and the real motive  
20 for the restriction is anticompetitive. At the time before  
21 the NBEs were agreed to and/or imposed on the Blues, they knew  
22 the NBEs would present an increasingly problematic growth  
23 constraint.

24 What's equally important is that the national best  
25 efforts were meant to decrease the incentives for some plans



1 to grow their own nonBlue brands to compete in the national  
2 market. From an inter-brand competitive point of view, that  
3 is critical, because why as a business would you invest in a  
4 business opportunity if you know that your profitability or  
5 revenue had a ceiling.

6 Of equal importance, Your Honor, if you had an idea  
7 for a business that you wanted to grow and enter into, you  
8 would want capital for it. And what bank or financial  
9 institution would loan that capital when that bank or  
10 financial institution knew that there was no incentive to grow  
11 that plan or to grow that business as the market would dictate  
12 because there was a rigid ceiling imposed by your inter-brand  
13 competitors.

14 If we look at the next slide, number 15, Your Honor  
15 this is the practical example that came out in the United  
16 States/Anthem trial. National best efforts rules meaningfully  
17 restrict future growth after their transaction if the merger  
18 were to be granted. Why? Because in order to maintain  
19 compliance, the combined entity can only grow \$1 outside of  
20 the 14 Blue states for every \$2 of growth inside the Blue  
21 states. That was an internal Blue Cross assessment of the  
22 affects of the implementation of the national best efforts  
23 rules on the proposed merger.

24 And the District Court and the Court of Appeals  
25 agreed that the national best efforts restricted growth post

1 compliance because the new company would have to manage its  
2 total revenue growth to not outpace the Blue revenue growth.

3 If the Court were to so find here, this Court would  
4 not, therefore, be alone in finding that the best efforts  
5 restraints in the Blue system are output restrictions on  
6 inter-brand competition among horizontal competitors.

7 If we could look at the next slide, please. This is  
8 what the Blues knew as well. It's really a crazy thing they  
9 say to themselves. How can one Blue argue that the rules are  
10 not anticompetitive and then turn around and say Blues are  
11 worried about a fellow Blue competing in their market and then  
12 highlight the license requirements? They are playing with  
13 fire. And Joe Swedish, CEO of Anthem, says, Great question.  
14 We can leave it for the courts to handle.

15 If we look at slide 17, this is what Anthem knew.  
16 The national best efforts is an insurmountable barrier to  
17 completing the merger with Cigna. Optimally, the best course  
18 of action is to pursue the transaction after the resolution of  
19 the Blues' antitrust litigation since it is highly likely that  
20 the resolution will substantially modify if not eliminate the  
21 national best efforts. The best course of action is to use  
22 the Blues' antitrust litigation as the vehicle to cause and  
23 achieve this outcome.

24 But it actually gets worse, Your Honor. If we look  
25 at slide 18, again, Anthem. In the unlikely scenario that the

1 settlement of the litigation does not modify or eliminate the  
2 national best efforts rule, we need to be prepared to  
3 challenge the enforcement of the national best efforts rule.

4 When I read that for the first time, I was taken  
5 somewhat aback because there's a huge scent of  
6 disingenuousness. The defendants apparently are seeking to  
7 have this court declare lawful what they're prepared to  
8 challenge as unlawful.

9 THE COURT: What is the context of that memo or that  
10 transcript?

11 MR. HAUSFELD: That, Your Honor, was taken from --

12 THE COURT: That's a document from the hearing?

13 MR. HAUSFELD: That's a document that was quoted in  
14 the public hearing on the preliminary injunction motion in the  
15 chancery court in Delaware. We have not seen that memo. It  
16 was never identified in this litigation and, therefore, was  
17 not produced in this litigation.

18 If we look at slide 19, Your Honor --

19 THE COURT: One second. So the context is the  
20 document was referenced and to some degree summarized or  
21 quoted in the hearing, but you don't have the document?

22 MR. HAUSFELD: Correct. The Blues inquired of one  
23 of our class representatives as to his expertise on the  
24 competitive affect of the best efforts rules, something you  
25 would have thought possibly was not necessarily seeking to

1 elicit a lay opinion, but they did anyway. They asked the  
2 question. The response is extremely instructive.

3 Can you describe any increased cost or harm to  
4 Rolison Trucking, it was asked, as a result of Blue Cross's  
5 use of the best efforts rules? And the witness candidly  
6 responded, It don't create free enterprise and competition.

7 Not letting it go, the Blue continued: You don't  
8 have any expertise in competition or economics. What makes  
9 you say that if the relief in that complaint was granted,  
10 there would actually be more competition in the health  
11 insurance market in the state of Alabama? And without  
12 hesitation, the witness says, I don't have any expertise, but  
13 it's common sense.

14 Your Honor, whether it's a matter of common sense,  
15 fundamental economics, business predictability or good law,  
16 best efforts restraints agreed to by actual or potential  
17 horizontal competitors are on their face anticompetitive.  
18 Thank you.

19 MS. KALLAS: Good morning, Your Honor. I have the  
20 fun task of trying to present these facts in an efficient  
21 manner.

22 THE COURT: Well, it looks like my lack of  
23 questioning has increased the time you have.

24 MS. KALLAS: Yes, that's true. But I'm going to try  
25 to make it as simple as possible. I'm going to talk about, as